FILE COPY

IN THE

Supreme Court of the United States

October Term, 1942.
No. 332

LEROY J. LEISHMAN,

Petitioner,

vs.

ASSOCIATED WHOLESALE ELECTRIC COMPANY, a corporation,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows:

Statement of the Matter Involved.

This is a suit brought in the United States District Court for the Southern District of California, by LeRoy J. Leishman, petitioner herein, against Associated Wholesale Electric Company, a corporation, respondent herein.

The petitioner alleged in his complaint that Reissue Letters Patent No. 20,827, was infringed by the respondent herein [R. Vol. I, pp. 2 *et seq.*]. A number of defenses were relied on by respondent. These defenses were

based respectively upon the following contentions urged on behalf of respondent: that the claims at issue (7, 8, 9, 10 and 11) were invalid for want of invention; that respondent did not infringe these claims; that claims 8, 9 and 10 were rendered invalid by the filing of qualifying disclaimers with regard to these claims; that the reissue patent was invalid because granted for an invention other than that secured by the original patent; and that respondent had intervening rights and therefore could not be held to infringe.

All these defenses, except that relating to the disclaimers, were set out in the respondent's answer [R. Vol. I, pp. 6 *et seq.*]. At the trial, these defenses were strenuously urged by respondent.

The District Court on January 31, 1941, rendered its opinion [R. Vol. I, pp. 19 *et seq.*]. In this opinion the claims at issue were held invalid for want of invention over the prior art; and the Court in its concluding paragraph [R. Vol. I, p. 32] states that ". . . it becomes unnecessary to consider the other defenses raised by the defendant." On May 1, 1941, findings of fact, conclusions of law and a final judgment were entered [R. Vol. I, pp. 33 *et seq.*]. The final judgment, as well as the findings and conclusions, were based mainly upon the opinion that the claims at issue were invalid for want of invention; none of the other defenses were passed upon.

By an appropriate court order, the time in which petitioner might file a motion under Rule 52(b) of the Rules

of Civil Procedure, was extended to May 31, 1941 [R. Vol. I, p. 40]. This order is dated April 28, 1941.

Thereafter a motion under Rule 52(b) was filed on May 28, 1941 [R. Vol. I, pp. 42 *et seq.*]. This motion was denied on June 9, 1941 [R. Vol. I, p. 47]. The notice of appeal was dated September 4, 1941 [R. Vol. I, p. 48]. The taking of the appeal therefore occurred within three months after the denial of the motion under Rule 52(b), but more than three months after the original judgment was filed.

This motion included a motion that the finding be revised to petitioner's advantage, and also that additional findings be made to petitioner's advantage with respect to the various defenses urged by respondent but not passed upon by the District Court. Then lastly, the motion states [R. Vol. I, p. 46]:

> "Consistently with these findings, the conclusions of law should be amended to state that the claim 7, 8, 9, 10 and 11 of reissue letters patent No. 20,827 in suit, are valid; that an injunction shall issue in the usual form, and that there be an accounting for past infringement."

On May 26, 1942, the Circuit Court of Appeals for the Ninth Circuit dismissed the appeal [R. Vol. IV, pp. 688, 689]. That Court held that petitioner's motion under Rule 52(b) was not a motion to amend the judgment; and states: "It was merely a motion to amend and supplement the findings and conclusions" [R. Vol. IV, p. 687]. The

Court held the motion ineffective to toll the period when an appeal must be taken, although it implied that a motion to amend the judgment would have been effective for this purpose.

On June 23, 1942, a petition for rehearing was filed, and this petition was denied on July 25, 1942 [R. Vol. IV, p. 689].

The Supreme Court Has Jurisdiction to Review the Judgment of Dismissal.

Petitioner relies upon Section 240, Judicial Code, Title 28, U. S. C. A., paragraph 347, in this regard. That a judgment of dismissal of an appeal may be properly reviewed by this Honorable Court is definitely decided in *Zimmern et al. v. United States*, 298 U. S. 167. In that case, at page 169, the late Justice Cardozo said: "This court granted certiorari to review a ruling as to practice that might tend, if erroneous, to introduce confusion into the law."

The Questions Presented.

Under Section 230 of U. S. Code, Title 28, no appeal may be considered to bring up any judgment before a Circuit Court of Appeals for review, unless application is made for the allowance of such an appeal within three months after the entry of the judgment. By judicial interpretation, it has long been the rule that this period of three months is tolled pending the determination of a petition for rehearing, or a motion to amend the judg-

ment, or a motion for a new trial. The Circuit Court of Appeals in this case held that a motion under Rule 52(b) for amending and supplementing the findings, and for correspondingly amending the conclusions of law, requiring an amendment of the judgment, does not suspend the appeal period, as does a petition for rehearing, a motion to vacate the judgment, a motion to amend the judgment, or a motion for a new trial.

It is urged on behalf of the petitioner that there is no reason to draw such an artificial line of distinction between a motion under Rule 52(b), and the other types of motions referred to by the Court of Appeals as serving to toll the statutory period of appeal; especially since the judgment would have had to be amended had any substantial part of the motion been granted. Further, the motion under Rule 52(b) actually *was* a motion to amend the judgment.

Reasons Relied Upon for Allowance of the Writ.

(1) The Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been but should be settled by this Court, and has decided that question in a way probably in conflict with *Zimmeren et al. v. United States*, 298 U. S. 167.

(2) The Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal procedure, in a way that is in conflict with an unequivocal statement of the Circuit Court of Appeals for the Eighth Circuit, in *Fiske et al. v. Wallace*, 115 Fed. (2d) 1003.

So far as petitioner can ascertain, this Court has not as yet interpreted Rule 52(b) of the Rules of Civil Procedure. It is obviously highly important, to prevent confusion, for all litigants to know whether the period for taking an appeal is tolled while a motion under that rule is under consideration by a lower tribunal.

In *Fiske et al. v. Wallace*, *supra*, the Court on page 1004 says:

> "... plaintiff still had the right accorded him by Rule 52(b) to file a motion to amend the judgment and also the right accorded by Rule 59(b) to file a motion for a new trial. There was no motion for new trial, but there was, as stated, a motion to amend the judgment filed after the notice of appeal but within the time allowed by the rule. We think that the mere existence of plaintiff's right to proceed under Rule 52(b) or Rule 59(b) did not deprive the judgment defendants of the right to take an appeal accorded them by the statute. If plaintiff had exercised his right to move for amendment within time and before the appeal was taken, such action would have preserved jurisdiction in the district court and the time for taking an appeal would have been extended."

This latter statement is at variance with the ruling by the Circuit Court of Appeals for the Ninth Circuit.

Accordingly, important rights may be placed in jeopardy due to the divergent attitudes of these two Circuit Courts of Appeal.

Prayer for the Issuance of the Writ.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 9970, LeRoy J. Leishman, Appellant, vs. Associated Wholesale Electric Company, a corporation, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Ninth Circuit be reversed by the Court, and for such other relief as to this Court may seem proper.

Dated this 18th day of August, 1942.

LEROY J. LEISHMAN,

By JOHN FLAM,

Counsel for Petitioner.

Certificate.

This petition is in my judgment well founded, and is not interposed for delay.

JOHN FLAM,

Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

I.

Publication of Opinions of Lower Courts.

The opinion in the District Court [R. Vol. I, pp. 19 *et seq.*] is reported in 36 Fed. Supp. 804.

The opinion in the Circuit Court of Appeals [R. Vol. IV, pp. 684, *et seq.*] is reported in 128 F. (2d) 204.

The opinion on the petition for rehearing is not published, but is found in Vol. IV of the Record, page 689. [R. Vol. I, pp. 38 *et seq.*]

II.

Basis of Jurisdiction.

1. The judgment of the District Court was entered on May 1, 1941.

2. The judgment of the Circuit Court of Appeals to be reviewed, was entered on May 26, 1942 [R. Vol. IV, pp. 688 *et seq.*]; and the petition for rehearing was denied on July 25, 1942 [R. Vol. IV, p. 689].

3. The statute under which jurisdiction is invoked is Section 240 of the Judicial Code, 28 U. S. Code Annotated, paragraph 347.

4. The United States Circuit Court of Appeals for the Ninth Circuit has dismissed the appeal taken from the judgment of the District Court, because the appeal was not taken within three months of May 1, 1941. In so ruling, the Court of Appeals has interpreted the effect of a motion under Rule 52(b) to amend and supplement the findings and conclusions as one which does not toll the period during which an appeal may be taken from a final judgment. This court has never passed on the interpretation of Rule 52(b) directly; although in analogous situations this court has ruled contrary to the opinion of the Court of Appeals in this case.

4. The cases believed to sustain said jurisdiction are as follows:

Zimmern et al. v. United States, 298 U. S. 167;

Alexander et al. v. Hillman et al., 296 U. S. 222.

III.

Statement of the Case.

This has already been stated in the preceding petition under the heading: Statement of the Matter Involved, and is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Ninth Circuit erred in overlooking the fact that identical reasons should have been applied in this case, for suspending the period during which an appeal may be taken from a judgment, as in connection with motions to vacate or amend the judgment.

2. The Court of Appeals for the Ninth Circuit overlooked the fact that the motion filed on behalf of petitioner herein is the same as a motion to amend the judgment, and that therefore the period during which an appeal may be filed is tolled.

V.

Argument.

The importance for determining the question presented in this petition is apparent. As will be pointed out hereinafter, the decision of the Circuit Court of Appeals for the Ninth Circuit seems to be in direct conflict with the decision of the Eighth Circuit Court of Appeals, *Fiske et al. v. Wallace*, 115 F. (2d) 1003. It is also inconsistent with *Zimmern et al. v. United States, supra*.

We shall now discuss the first specification of error.

The perfection of an appeal in the Ninth Circuit requires that "appellant shall . . . file with the clerk a concise statement of the points on which he intends to rely on appeal. . . . ." [Rule 19(6) of the Court of Appeals for the Ninth Circuit]. Such a statement is embodied in the present record. [R. Vol. II, pp. 489 *et seq.*] Of necessity, the points there set forth, as must be usual in many appeals, referred to the *findings* or *lack* of findings. No such concise statement can possibly be prepared until the findings and conclusions are finally settled.

It is just as important therefore to await the final crystalization of the findings and conclusions before appeal be taken as it is to await the determination of a motion for a new trial, or a petition for rehearing, or a formal motion to amend the judgment. Accordingly there should be no distinction whatever in the rule between a motion to amend the findings under Rule 52(b) such as petitioner presented, or any of the other types of motion referred to by the Circuit Court in its opinion, as sufficing to suspend the period in which an appeal may be taken. The same reasoning applies to all of these situations. And in this connection, it was unnecessary to ask for a new trial, for Rule 52(b) undeniably gives the litigant the right to have the findings corrected if in error, without the expense of a time-consuming new trial.

Rule 52(b) clearly provides that the Court may amend its findings or make additional findings, and may amend the judgment accordingly. If a motion under Rule 52(b) be granted in whole or in part, then the Court may reconsider the propriety of the judgment, and may amend the judgment to agree with the amended findings.

The Court of Appeals refers to such decisions as *Fiske et al. v. Wallace*, 115 F. (2d) 1003, in support of the

proposition that a motion to amend *the judgment* would serve to suspend the period when an appeal may be taken. In this connection reference is here made to the opinion of the late Justice Cardozo, in the case of *Zimmern et al. v. United States*, 298 U. S. 167, 56 Supreme Court Reporter, 706. In that case the learned judge expresses the reason for suspending the time for taking an appeal while the decree or judgment is under question. The same logic applies when a motion is made under Rule 52(b). In that case the trial judge, on his own motion, had extended the term of the court for the purpose of making it possible to modify or amend the decree.

Although the trial judge did not act at the instance of either of the parties, the reasoning of Judge Cardozo's opinion applies equally to this case. So long as the trial judge had the motion under advisement, it does not matter whether the judgment was to be modified or altered at the instance of any of the parties, or at the instance of the judge. In the *Zimmern* case the order of the trial judge to suspend the operation of the decree is the exact equivalent of a pending motion to correct or amend or supplement the findings and conclusions.

Judge Cardozo, in *Zimmern et al. v. United States*, on page 169, in discussing the Court's own motion to consider the propriety of the decree, states:

> ". . . He stated broadly and, for all that appears, of his own motion that changes must be made, and without a word to indicate whether he meant them to be great or little. We think the effect of that order was to suspend the operation of the decree so that no appeal could be taken from it until it had been amended or confirmed, and its vigor thus restored. *Until such action had been taken, it was no*

longer a decree at all. The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. Doss v. Tyack, 14 How. 297, 313, 14 L. Ed. 428; Bassett v. United States, 9 Wall. 38, 41, 19 L. Ed. 548; Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797; Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 40, 11 S. Ct. 691, 35 L. Ed. 332. *Finality was lacking until his choice had been announced.*" (Italics ours.)

It is important to note in this connection that it does not matter whether any modifications had been made in the judgment, so long as revisions of the judgment were still under consideration. Even if the decree had been confirmed without change, the period during which an appeal could be taken would nevertheless have been suspended until such confirmation.

By the same reasoning, until the findings and conclusions are confirmed or amended, there should be a suspension of the period in which an appeal be taken; for the provisions of Rule 19(6) for the Court of Appeals could not be followed until final disposition of the motion to amend.

Jurisdiction of the lower court is retained until the motion under Rule 52(b) is disposed of. Otherwise, a litigant could appeal even while the findings and conclusions are still awaiting revision under a pending motoin.

We shall now consider the second specification of error.

The motion under Rule 52(b) *is* actually a motion to amend the judgment. Such a motion *was* so construed as a motion to amend the judgment in *Fiske et al. v. Wallace,*

supra. On page 1004 the Court in discussing the situation, says:

". . . plaintiff still had the right accorded him by Rule 52(b) to file a *motion to amend the judgment*. . . ." (Italics ours.)

And an examination of the motion itself [R. Vol. I, pp. 42 *et seq.*] necessarily implies that the judgment be amended. Rule 52(b) says that the Court "may amend the judgment accordingly." It would have been impossible to amend the findings and conclusions of law and to add to findings as asked for in the motion, without the *absolute necessity* of amending the judgment. The final judgment states [R. Vol. I. pp. 38 and 39]:

"It Is Hereby Ordered, Adjudged and Decreed as follows:

"(1) That claims 7, 8, 9, 10 and 11 of Reissue Letters Patent No. 20,827, in suit, are invalid for want of invention.

"(2) That the complaint herein be and the same is hereby dismissed.

"(3) That the defendant have judgment against the plaintiff, LeRoy J. Leishman, for its necessary costs and disbursements incurred herein, including the court reporters' fees and per diems and the cost of the Court's copy of the transcript of record, all in the sum of $412.70, to be taxed by the clerk."

The petitioner asked in his motion [R. Vol. I, p. 46] for definite changes that would have required amendments respectively in these three numbered paragraphs of the judgment, the motion stating:

". . . the conclusions of law should be amended to state that the claims 7, 8, 9, 10 and 11 of reissue letters patent No. 20,827 in suit, are valid; that an

injunction shall issue in the usual form, and that there be an accounting for past infringement."

Such injunction could not possibly issue, nor could there be any accounting for past infringement, without the judgment being amended accordingly, as provided in Rule 52(b).

The Court of Appeals for the Ninth Circuit disposes all this, with the statement that [R. Vol. IV, p. 687]: "The motion in this case . . . was *merely* a motion to amend and supplement the findings and conclusions." (Italics ours.)

The fact that petitioner did not *explicitly* request that the judgment be amended accordingly—a request that was, under the circumstances, superfluous—offers no excuse for this strict ruling of the Circuit Court of Appeals.

The Supreme Court in *Zimmern et al v. United States, supra*, has definitely held that while a judgment is subject to revision, it is not a judgment at all. Finality is lacking until the Court's choice is announced regarding amendment or confirmation. And such an interpretation of a motion under Rule 52(b) consistent with this Supreme Court case should be adhered to, rather than the artificial distinction between a motion under Rule 52(b) and the other motions referred to in the opinion.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

JOHN FLAM,
Counsel for Petitioner.